



NATIONAL ASSOCIATION
OF REALTORS®

The Voice for Real Estate®

430 North Michigan Avenue
Chicago, Illinois 60611-4087
312.329.8411 Fax 312.329.5962
Visit us at www.REALTOR.org.

NRT, Inc.
465 Maple Avenue West, Suite B
Vienna, Virginia 22180-3441
703/268-2001 Fax 703/356-3441
E-mail: tstevens@cbmove.com

Thomas M. Stevens, CRB, CRS, GRI
President

June 9, 2006

The Honorable Ben S. Bernanke
Chairman
Board of Governors of the
Federal Reserve System
20th Street and Constitution Avenue, N.W.
Washington, D.C. 20051

Re: The Home Depot, Inc. Notice of Change in Control

Dear Chairman Bernanke:

On behalf of the 1.3 million members of the National Association of REALTORS® (NAR), I am writing to request the Board of Governors to initiate a review of certain transactions contemplated by the business plan described in the Notice of Change in Control (Notice) filed by The Home Depot, Inc. (Home Depot) with the Federal Deposit Insurance Corporation in connection with Home Depot's proposed acquisition of EnerBank USA, a federally-insured Utah industrial loan company (ILC). We believe that the transactions would constitute covered transactions under Section 23A of the Federal Reserve Act,¹ (Section 23A). In view of the important public policy issues Home Depot's proposed business plan raises under Section 23A, which limits an insured bank's transactions with affiliates, we urge you to request the FDIC to suspend processing the Notice until the Board has completed its review of the proposed transaction.

The National Association of REALTORS®, "The Voice for Real Estate," is America's largest trade association, including NAR's five commercial real estate affiliates. REALTORS® are involved in all aspects of the residential and commercial real estate industries and belong to one or more of some 1,500 local associations or boards, and 54 state and territory associations of REALTORS®. On February 1, 2006, I wrote to you to congratulate you on becoming Chairman and to express our concern with several regulatory actions that we believe threaten to erode the important national policy against mixing banking and commerce. One of our concerns relates to Wal-Mart's application to

¹ 12 U.S.C. § 371c.

the FDIC to acquire an ILC in light of the inherent and irreconcilable conflicts of interest the proposal raised. Now, Home Depot has added significantly to our concerns through its proposed acquisition of EnerBank, which specializes in making unsecured home improvement loans to customers of home improvement contractors.

Home Depot's Notice presents a novel and troubling issue that we believe raises concerns under Section 23A. Home Depot proposes to use EnerBank to expand its "business and relationships" with home improvement contractors.² Home Depot stated that "[t]his acquisition gives us the opportunity to offer our services to The Home Depot's large contractor customer base This growth opportunity and the resources of The Home Depot will also strengthen the high level of service we offer to our existing contractors and program sponsors." When the contractor and the homeowner are negotiating a contract, the contractor will "tell the client to phone EnerBank" which will approve the loan. The EnerBank loan to the homeowner "starts" when the homeowner is satisfied that a contractor has completed the home improvement project and when the homeowner endorses an EnerBank check to the contractor.

Home Depot's Notice goes on to state:

The Home Depot believes that EnerBank's ability to help contractors be more successful will strengthen The Home Depot's affinity relationship with its contractor customers, and as a result, they will be more likely to purchase their materials from The Home Depot.³

Home Depot's proposed business plan creates an inherent conflict of interest because Home Depot will have an incentive to encourage EnerBank to provide financial services to customers of home improvement contractors that are Home Depot customers, and not to those of other contractors, because EnerBank's loans will increase Home Depot's sales. As a wholly-owned subsidiary of Home Depot, on which it presumably will be dependent for a substantial portion of its funding, EnerBank will have a built-in bias towards favoring applicants who do business with contractors that are customers of its parent. The Home Depot plan, therefore, has the potential to expose EnerBank to substantial risk of losses because of this inherent bias and conflict of interest.

Section 23A becomes even more important as a means to protect banks from potential abuse when commercial enterprises such as Home Depot and Wal-Mart attempt to acquire banks in order to take advantage of the affiliation primarily for the benefit of the banks' parents. As an insured bank, EnerBank is subject to the restrictions of Section 23A.⁴ Loans made by EnerBank to customers of contractors that are customers of Home Depot would be transactions subject to Section 23A because the proceeds of the transaction are used for the benefit of, or transferred to, Home Depot, as evidenced by Home Depot's own statements. The Notice suggests that restrictions on transactions with

² <http://ir.homedepot.com/releasedetail.cfm?releaseid=195724>

³ Interagency Notice of Change in Control filed by The Home Depot May 8, 2006 at page 10.

⁴ 12 U.S.C. 1828(j).

affiliates are addressed by the proposed policy that prohibits contractors from purchasing material with an EnerBank check in Home Depot stores.⁵ This misses the mark. We believe that such a limitation is meaningless because Home Depot would benefit from the loan EnerBank makes and because it is likely Home Depot would, in fact, receive loan proceeds that borrowers channel to contractors. Although it may be difficult to trace the proceeds of the loans, because funds are fungible, it is clear that EnerBank's loans will provide contractors with additional resources with which to do business with Home Depot. Accordingly, we believe that it is important for the Board to prevent this blatant circumvention of Section 23A.

Intervention by the Board is appropriate in light of the Board's position concerning its role as the ultimate interpretive authority for Section 23A. In 2004, the FDIC proposed a rule to address its role with respect to nonmember banks in connection with Regulation W, Transactions Between Member Banks and Their Affiliates,⁶ which the Board issued to implement Section 23A.⁷ The FDIC stated that the purpose of the proposal was to identify the FDIC as the appropriate agency for nonmember banks in the administration and interpretation of Section 23A and in granting exemption requests.⁸ In its comment letter to the FDIC, the Board expressed "serious concerns" with the proposal to provide the FDIC with exclusive authority that had been statutorily conferred on the Board.⁹ The Board's letter states that the Board was "troubled" by the FDIC's claim to have exclusive authority to administer and interpret Section 23A for nonmember banks. The Board advised the FDIC that Section 23A appears to be the type of statute over which Congress has "expressly and exclusively" provided another agency (in this case, the Board) with authority to regulate and administer. In its letter, the Board also explained:

Sound public policy considerations support the Congressional decision to consolidate bank transactions with affiliates regulation in the Board. Sections 23A and 23B occupy a place of central importance in the bank regulatory framework, and a single agency should have ultimate authority to interpret and provide exemptions from the statute in order to ensure uniformity of application. Appointment of a single agency as the administrator of transactions with affiliates regulation for all depository institutions prevents this crucial safety and soundness bulwark from becoming subject to regulatory arbitrage.

Home Depot's proposal raises important issues regarding how Section 23A is to be interpreted and applied to transactions by insured banks. In view of the Board's position that authority to interpret Section 23A rests exclusively with the Board, we believe the Board should intervene to determine whether Home Depot's proposal would

⁵ Notice at page 10.

⁶ 12 C.F.R. Part 223.

⁷ 69 *Fed. Reg.* 12571 (March 17, 2004).

⁸ 69 *Fed. Reg.* at 12572.

⁹ See Board letter to Robert E. Feldman, Executive Secretary, FDIC, Re: Proposed Rule on Sections 23A and 23B of the Federal Reserve Act.

The Honorable Ben S. Bernanke

Page 4 of 4

give rise to covered transactions under Section 23A. In light of these considerations, we urge the Board to initiate an inquiry and request the FDIC to suspend processing Home Depot's Notice until the Board has had an opportunity to review Home Depot's proposed business plan to determine its consistency with Section 23A.

Thank you for considering our request.

Sincerely,

A handwritten signature in black ink, appearing to read "T. Stevens".

Thomas M. Stevens, CRB, CRS, GRI
2006 President, National Association of REALTORS®

cc: Members of the FDIC Board:

The Honorable Martin J. Gruenberg, Acting Chairman
The Honorable Thomas J. Curry
The Honorable John C. Dugan, Comptroller of the Currency
The Honorable John M. Reich, Director, Office of Thrift Supervision
Scott Alvarez, General Counsel, Federal Reserve Board